FILED
FEB 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF[1]

I.

Petitioner's constitutional right to due process was violated by the issuance of the induction order.

The government, while first asserting that this Court's decision in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), was *not* a "constitutional holding" (Brief for the United States, pp. 14-15, 31), then admits that

[1] Petitioner's counsel regret that it was impossible to submit this Reply Brief earlier, and respectfully advise the Court that the Government's Brief, due on January 28, 1974, was not received until February 19, 1974, 22 days late. (At petitioner's counsel's request, the Solicitor General's Office did serve a non-final typescript on February 12, 1974, 15 days late.) For the reason cited, pursuant to Rule 40(c), leave of the Court is respectfully requested to receive this Reply Brief.

> "... the Court's opinion [in *Gutknecht*] makes it clear that it was concerned about the *constitutional ramifications* of using the threat of military induction as a punitive sanction to enforce the regulations of the Selective Service System. These *constitutional* issues are both procedural (the lack of full hearing procedures prior to the imposition of the sanction of acceleration) and substantive (the use of the threat of military service as a punishment, particularly in a factual setting implicating First Amendment values). If a defendant convicted for failing to honor an accelerated induction order based upon delinquency status could make out such a constitutional case in a Section 2255 hearing he would be entitled to relief."

Brief for the United States, p. 32 (emphasis added).

While, as shown immediately *infra*, this recognition by the government is highly supportive of petitioner's claims, it also demonstrates the legally myopic interpretation of the *Gutknecht* decision under which the government has been erroneously laboring.

Gutknecht nowhere implied, as the government seems to suggest, that the touchstone for the invalidation of a delinquency induction was the reason for the delinquency. If, in fact, the basis for the delinquency was a registrant's exercise of arguably protected activity, he may of course have additional grounds for complaint. See, e.g., *Wolf* v. *Selective Service*, 372 F.2d 817 (2d Cir. 1967). But, more importantly, the decision in *Gutknecht* was, bottomed on the total absence of *any* statutory authority for the entire delinquency schema. Mr. Justice Douglas, speaking for the court, clearly denominated *Gutknecht* as one of those

classes of constitutional cases, dealing with "the liberties of the citizen." 396 U.S. at 306-307, citing *Kent* v. *Dulles*, 357 U.S. 116, 128-129 (1958).[2]

Petitioner submits that *Gutknecht* is solidly in the constitutional tradition of cases such as *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 553 (1935); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Zemel* v. *Rusk*, 381 U.S. 1, 22 (1965); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Schneider* v. *Smith*, 390 U.S. 17 (1968); and *Kent* v. *Dulles*, *supra*, all of which protect the liberties of the citizenry from unauthorized overreaching by the executive department.

Selective Service boards are creatures of statute. The exercise of the regulatory authority must be delimited by these underlying statutes. What petitioner here complains of is not merely the violation of a "technical" regulation, but, rather, the absence of any jurisdictional authority for the issuance of his induction order. Simply stated, the order was issued under a regulatory scheme heretofore held totally invalid in *Gutknecht*. As the Ninth Circuit observed in *United States* v. *Fox*, 454 F.2d 593 (1971), but for the delinquency regulations in existence at the time

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[2] In *Kent* v. *Dulles*, *supra*, 357 U.S. at 120, this Court cited *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420-430 (1935), where Mr. Chief Justice Hughes clearly explicated the constitutional basis for invalidation of agency action because of excessive and standardless delegation of legislative authority. If the government is at a loss to ascertain the constitutional inhibitions which were violated by the unauthorized promulgation of the delinquency regulations, the answer is provided by the reminder in *Panama Refining Co.* that under Article I, §§1 and 8, legislative power is vested exclusively in Congress. As Chief Justice Hughes observed:

"... there are limits of delegation which there is no constitutional authority to transcend." 293 U.S. at 429.

of the offense in question here, and later invalidated in *Gutknecht*, registrants such as Davis could not be inducted. 454 F.2d at 595. Concededly, the only answer prior to the amendment to 32 C.F.R. 1631.7 was to prosecute for the underlying regulatory violation which in this case, as in *Peet* v. *United States*, 399 U.S. 523 (1970), was a failure to report for a physical examination.[3]

Thus, petitioner's claim is that he cannot be deprived of his liberty in the absence of any *valid* regulatory authority therefor. His constitutional demand is predicated upon this simple constitutional requirement stemming from the *Gutknecht* decision.

Neither was *Gutknecht* primarily concerned with particular procedural due process issues under the delinquency regulations as the government seems to imply in an effort to deprecate the breadth of that decision's constitutional basis. See, *United States* v. *Kelly*, 314 F. Supp. 500, 509 (E.D.N.Y. 1970). It was only in reference to the government's proffered theory, astoundingly reasserted here, see p. 21, Brief for the United States, that inductions should be substituted for prosecutions in order to further the aims of the Selective Service Act, see p. 47, Brief for the United States in *Gutknecht* v. *United States*, No. 71, Oct. T. 1969, that the Court dealt with the subject of the absence of procedural due process from delinquency procedures. 396 U.S. 307-308.

There is thus no question but that *Gutknecht* is a decision based upon constitutional due process commands, and that

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[3] It is to be noted that the right to purge one's regulatory transgressions extends up to the time of trial. See 50 U.S.C. §454(a); 32 C.F.R. 1642.2 (1968). Indictment thus does not mean that the Armed Services are deprived of the registrant's assistance. This has been consistent Department of Justice policy in most federal jurisdictions.

even under the standards advanced by the government *supra*, petitioner is entitled to reversal, because "his conviction was contrary to the fundamental law of the Constitution."[4]

II.

Petitioner's claims are cognizable in a proceeding under 28 U.S.C. §2255.

As to this issue the government also concedes partial error on the part of the Court below. Brief for the United States, p. 25 n. 11.[5]

Much of the analysis of the government in its brief regarding the instant issue is predicated upon the correctness of its initial assumption, discussed in Point I, *supra*, that *Gutknecht* is not a decision reaching constitutional dimensions. See p. 31, Brief for the United States.

Whatever the government's theories as to retroactivity may be, two critical factors are now clear. First, the government recognizes that the *Fox* decision,

> "...demonstrates a greater likelihood that petitioner's arguments at the time of his original conviction had

[4] Page 32, Brief for the United States.

[5] The government indeed appears, in footnote 11, to confess error and to dissociate itself from the totally inconsistent ruling below in *Davis III* that the intervening change of law cannot be considered on a Section 2255 application because of notions of law of the case. Yet, elsewhere in its Brief (p. 39), the government inconsistently urges that one of the reasons why relief should be denied to petitioner is that he has previously advanced the same claim on direct appeal "and it has been denied on the merits."

merit and were incorrectly rejected." (Page 36, Brief for the United States.)[6]

Second, the government's arguments generally regarding retroactivity notwithstanding, the Ninth Circuit itself has accorded *Fox* retrospective application. See, *Zack* v. *Benson*, 454 F.2d 596 (1971).[7] Nowhere in its brief does the government seek to explain the effect of the *Zack* case upon petitioner. Cf. also, *Peet* v. *United States, supra.* Obviously, at least one panel of the Ninth Circuit has determined that claims such as petitioner's are cognizable via a §2255 motion.

Finally, even if the government's initial premise, that *Fox* and *Gutknecht* are cases based merely on statutory interpretation, has any merit, petitioner is nevertheless entitled to relief, because:

> "At no time has [this Court] denied retroactive application to a *statutory* interpretation which would invalidate a prior conviction."

Brough v. *United States*, 454 F.2d 370, 372 (7th Cir. 1972).

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[6] Notwithstanding this concession, on p. 36, and indeed the further concession that petitioner's was a "material meritorious claim", the government argues on p. 35 that the change in law which converted petitioner's claim into one possessing material merit is a "red herring", because §2255 relief should not be granted even to a meritorious claim. This is an amazing tour de force because elsewhere in the Brief (pp. 29-30), the government vigorously urges the policy reasons for narrowing post-conviction relief to embrace only meritorious applications.

[7] A copy of the Statement of Facts, extracted from Zack's brief in the Ninth Circuit, is set forth as an Addendum to this Reply Brief.

Furthermore, it has traditionally been held that where a court of supreme jurisdiction renders an act non-criminal, as did this Court in *Gutknecht* vis a vis that petitioner's refusal of induction, retrospective application has always been the rule. *United States* v. *United States Coin and Currency*, 401 U.S. 715 (1971); *Rosecrans* v. *United States*, 378 F.2d 561, 566 (5th Cir. 1967). *United States* v. *Kelly*, *supra* at 505.

CONCLUSION

For all of the foregoing reasons, the conviction should be reversed and the indictment ordered dismissed.

Respectfully submitted,

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ADDENDUM

No. 71-1304

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CHARLES ZACK,

Appellant,

vs.

CHARLES BENSON,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANT'S OPENING BRIEF

I.

Statement of Facts

Petitioner's Selective Service file [Petitioner's Exhibit 1] discloses that on May 2, 1968, the Petitioner was classified I-A and was ordered to report for a physical examination on June 13, 1968. Petitioner failed to report for that examination and, subsequently, returned both his classification and registration cards to his local board. On August 12, 1968, Petitioner was declared delinquent I-A.

An order for medical interview was mailed to Petitioner on August 23, 1968; the interview was to be held on August 30, 1968. Petitioner failed to attend this medical interview. Additionally, on August 23, 1968, a Delinquency Notice, advising Petitioner of the declaration of delinquency of August 12, 1968, was mailed.

On October 7, 1968, a notation was made in Petitioner's Selective Service file reading: "Delinquent Order for Induction." On October 21, 1968, defendant was ordered to report for induction on November 12, 1968. Petitioner reported to the induction station but refused to process for induction.

Petitioner was subsequently convicted by a jury and was sentenced to a forty-two (42) month term for violation of the Military Selective Service Act of 1967 (refusal to be inducted in violation of 50 U.S. Code App. 462). Such sentence was delivered on July 28, 1969, by the Honorable Judge Manuel Real.

Defendant sought discharge under a motion pursuant to 28 U.S.C. 2255. Such motion was denied by Judge Manuel Real, United States District Court Judge, on the 16th day of November 1970. Subsequently, Petitioner was placed on parol from Safford Prison on recommendation of the Board of Parol. However, he remains in custody for the purpose of 28 U.S.C. 2255.

It is from the denial of the motion pursuant to 28 U.S.C. 2255 that Petitioner appeals.

II.

Statement of the Issues

1. Does the record indicate that automatic reversal is required under *Gutknecht* v. *United States*, 396 U.S. 295?

2. Does Petitioner's failure to attend preinduction physical allow his Selective Service Board authority to call for defendant's induction without following Selective Service Regulations?